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Twiqbal: A Political Tool;Note

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"*TWIQBAL*": A POLITICAL TOOL

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INTRODUCTION

Rules are meant to be (conveniently) followed. The Rules Enabling Act[1] was a legislative effort to promote efficiency within the judicial process, by enabling the Court to employ rules of practice so that a justice-oriented, systematic court process may be achieved. In 1938, the Federal Rules of Civil Procedure ("F.R.C.P") were adopted by Congress and implemented in the federal court system.[2] The Federal Rules epitomize a dramatic shift from common law to establish a more effective approach for federal court proceedings. Despite the drafters' incomplete efforts to secede from traditional code systems, the Federal Rules restructured civil litigation to further the democratic ideals of an accessible justice system where adjudication

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1. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (1934).

2. *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1708-09 (2004).

is based on the merits rather than technicalities. The pleading standard[3] illustrates a break from code pleading to simplified pleading,[4] where the standard facilitated a means to justice through openness, ease, and efficiency[5] rather than mastering "a game of skill."[6]

In curtailing the procedural barriers, the success of the F.R.C.P. partly lies in the drafter's reliance on plain language.[7] The dependence on ordinary text illustrates that the Federal Rules ought to be enforced to ensure the "equality of treatment [and opportunity] of all parties and claims in the civil adjudication process."[8] The emphasis on openness, transparency, and predictability enabled civil litigation to expand within the public sector by targeting government oversight and advocating public policies through claims of conspiracy, discrimination, and toxic tort actions.

Throughout the twentieth century, pleadings were the driving force in ensuring that the drafters' original intentions[9] became a reality. In *Conley v. Gibson*,[10] the Supreme Court solidified and, arguably, broadened the pleading standard set forth in the Federal Rules. The decision upheld that a "fair notice" approach to pleading was sufficient because discovery and other pretrial procedures provided appropriate mechanisms to reveal the precise nature of claims and to narrow disputed facts and issues prior to trial.[11]

In the early 1990s the Supreme Court became progressively more reluctant to advocate an individual's right to trial absent limitation.[12] With increasing litigation

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3. FED. R. CIV. P. 8.

4. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV 1015 (1982); Stephen B. Burbank, *Pleading and the Dilemmas of 'General Rules'*, 2009 WIS. L. REV. 535 (2009).

5. FED. R. CIV. P. 1.

6. Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

7. *See* Peter Julian, *Charles E. Clark and Simple Pleading: Against a "Formalism of Generality," Under the Federal Rules*, 104 NW. U. L. REV. 1179, 1195 (2010) (considering that the Federal Rules were influenced by philosophical ideals, such as permitting any person to put his claim before the judge and judges will place truth ahead of cleverness and tactics in deciding the validity of the case); *see also* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 4-5 (2010) ("Federal Rules created a system that relied on plain language and minimized procedural traps, with trial by jury as the gold standard for determining a case's merits.").

8. *See* Miller, *supra* note 7, at 5 ("This idea was a baseline democratic tenet of the 1930s and then of postwar America with regard to such matters as civil rights, the distribution of social and political power, marketplace status, and equality of opportunity.").

9. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944); *see* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554, 559 (2002) (arguing that *Dioguardi* is a prime example that illustrates drafters' intentions, where the case reinforces that the rule only requires "a short and plain statement of the claim showing that the pleader is entitled to relief").

10. 355 U.S. 41 (1957).

11. *Id.* at 47-48; Joshua Civin & Debo P. Adegbile, Issue Brief, *Restoring Access to Justice: The Impact of Iqbal and Twombly on Federal Civil Rights Litigation*, AM. CONST. SOC'Y FOR L. & POL'Y 3 (Sept. 2010), http://www.acslaw.org/files/Civin and Adegbile issue brief final (9-14-10).pdf [hereinafter Civin & Adegbile].

12. *See* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1039 (1993) ("[T]he Supreme Court has become increasingly fond of using the plain meaning doctrine to interpret the Federal Rules of Civil Procedure.").

costs, discovery expenses, and the dramatic rise of corporate parties, the privilege to use the federal court system to seek justice transformed into a burden,[13] where strike suits and abusive litigation became more common. As a result, pretrial procedures became progressively more arduous as issues and stakes expanded with complexity and volume.[14] Accordingly, the Supreme Court responded.

In *Bell Atlantic Corporation v. Twombly*[15] and *Ashcroft v. Iqbal*,[16] the significance of these Supreme Court decisions materialized the mounting concerns regarding such costs in light of efficiency.[17] Rather than relying on other trial safeguards,[18] embedded in F.R.C.P., the Court ultimately held that the source of the problem was found in the existing interpretation of the pleading standard. In *Twombly*, the Supreme Court expressly overruled *Conley* and "retired" its "no set of facts" language and stipulated that one must plead "enough facts to state a claim to relief that is plausible on its face";[19] thus, amending the standard of possibility to plausibility.[20] *Iqbal* not only reinforced *Twombly,* but maintained that *Twombly's* heightened standard applied uniformly to all civil actions, confirming the transsubstantivity of "Twiqbal."[21] Critics contemplate whether *Twiqbal* was indeed a departure from the pleading standard or if it merely solidified the court's daily practice. Nevertheless, without undertaking the proper steps set forth in the Rules Enabling Act, a clear divergence continues to exist between the codified rule and the current *Twiqbal* holding.

This Note aims to explore the legitimacy behind *Twiqbal.* Part I will briefly look at the objectives of the Rules Enabling Act and the Federal Rules of Civil Procedure. The purpose of establishing a uniform and transsubstantive approach will be considered in light of democratic ideals and efficiency; examining the separation of powers as well as its practical application. Congress allocated the rule

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13. *See* Catherine T. Struve, *Procedure as Pamlimpsest*, 158 U. PA. L. REV. 421 (2010) (reviewing the interlocking aspects of contemporary civil procedure in conjunction with the court's contemporaneous pleading stance and the potential effects on substantive rights).

14. Miller, *supra* note 7, at 9 ("To some degree these shifts are a response . . . from the business community.") (*citing* CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006)).

15. Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007).

16. Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

17. *See* FED. R. CIV. P. 1. *See also* Ronald J. Allen and Alan E. Guy, *Conley as a Special Case of Twombly and Iqbal: Exploring the Intersection of Evidence and Procedure and the Nature of Rules,* 114 PENN ST. L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1589732.

18. *See* FED. R. CIV. P. 12(b)(6) (motion to dismiss); FED. R. CIV. P. 9(b) (heightened pleading standard); FED. R. CIV. P. 56 (summary judgment).

19. 550 U.S. at 570, 579 (Stevens, J., dissenting).

20. In determining the requirements to satisfy F.R.C.P. 8(a)(2), the *Conley* Court decision provides a two-part holding: (1) a statement must simply give the defendant "fair notice" of what the plaintiff's claim is and the grounds upon which it rests; (2) a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove "no" set of facts in support of his claim which would entitle him to relief. This Note only pertains to the former rather than the latter. *See generally* David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 133-37 (2010) (explaining how *Iqbal* continued the standard of plausibility expressed by the *Twombly* Court).

21. The nickname "Twiqbal" has gained increasing popularity when collectively referring to the heightened pleading requirements set forth by *Twombly* and *Iqbal. See, e.g.,* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010)

making power to the Supreme Court because Congress believed power should be given be to those who are "better suited" to ensure the competence of the federal courts.[22] The Federal Rules of Civil Procedure were also constructed after the Federal Rules of Equity, where principal drafters, Charles E. Clark and Edson R. Sunderland, were influencing actors that advocated that judges should be given appropriate discretion in determining what is fair and equitable.[23] Although the Federal Rules of Civil Procedure did hold neutrality and uniformity to be key, the notion of subjectivity was not lost during the initial drafts.

Part II considers how public policy and litigation changed over the twentieth century and continued into the twentieth first century. From *Dioguardi v. Durning* and *Conley v. Gibson* to *Twiqbal,* this article will survey the differing court rationales and how the Court exercised its political unaccountability to make political decisions and to accommodate political changes. Part III will focus on the legitimacy of the *Twiqbal* decisions from a procedural and policy perspective. These decisions will be viewed in light of the Rules Enabling Act and the drafters' intentions behind the Federal Rules. The role of judicial gate-keeping will also be examined in determining whether judges should have the authority and to what extent in certifying that frivolous and speculative lawsuits are not pursued,[24] and whether the Court can respond to political concern through adjudication.

Twiqbal's "plausibility" pleading standard is advantageous in various respects and does respond to present day concerns, but such justifications do not render the standard legitimate. Part IV questions why the Supreme Court decided to use these rulings as a means to alter the meaning and application of Rule 8 rather than amending the rule's language. Although *Twiqbal* differs from *Conley,* it does not necessarily render it invalid. *Twiqbal* should be addressed in light of original interpretation of Rule 8. The Rules Enabling Act does not provide a short-cut nor does it freely permit the Supreme Court to make or amend rules in its judiciary capacity; they must continue to follow the procedures set forth in the statute.

In conclusion, the source of the controversy does not lie with whether *Twiqbal* was correctly decided, but whether the manner that it was decided was permissible. Although judicial overreach is an established principle in American democracy, I propose that an amendment be provided to the Rules Enabling Act to further solidify this federalist objective and to prevent the *Twiqbal* controversy from repeating itself.

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22. Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 896 (1999); *see also* Burbank, *supra* note 2, at 1731-32.

23. *See* Fairman, *supra* note 9 at 554 n.21, 557.

24. *See* Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J. L. & PUB. POL'Y 1107, 1109 (2010).

I. HISTORICAL PERSPECTIVE

Rules Enabling Act

The early 1930s marks the onset of judicial activism. The political sphere was influenced heavily by Roosevelt's New Deal program and the economic environment was driven by the capitalist needs of efficiency and debt repayment.[25] The 1934 Rules Enabling Act illustrates congressional consent and authorization that the Supreme Court may promulgate rules of civil procedure for the federal district courts, as long as substantive rights are not altered.[26] Shifting the authority of rulemaking from Congress to the judicial branch illustrates congressional recognition that prior legislative efforts, e.g., Code Pleading and the Conformity Act, were futile. These actions convey that legislatures believe that procedural rules should be in the hands of those who are procedurally involved on a day-to-day basis, rather than those who are politically accountable and unfamiliar with judicial realities.[27]

Drafting Rule 8

Breaking Away from Traditional Pleading

The concept of pleadings may be attributed to the requirements set forth in Medieval England. With emphasis on formality, pleadings were facilitated to regulate the level and types of cases heard, acting as a mechanism to keep litigants out of the courtroom.[28] The "science of special pleading" became synonymous with

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25. Congress imparted responsibility to the Supreme Court by realizing that it may be more appropriate for the judicial branch to modernize the statutory framework for the procedural rulemaking process. *See* Burbank, *supra* note 2, at 1678.

26. Rules Enabling Act of 1934, S. 3040, 73d Cong. (1934). The current version of the Rules Enabling Act is contained in 28 U.S.C. § 2072 (2006), which provides:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

27. Bone, *supra* note 22, at 888 & n.1 (1999); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 617 (2010) ("Those who designed and enacted the 1934 Rules Enabling Act did not suppose that a procedure equally suited to all kinds of cases could be devised, but if special rules for a substantive category of cases were needed, their creation would be a task for Congress.").

28. It was not until the sixteenth century, that pleadings became written and formalized; prior to that, pleadings were informal and delivered orally to the court. Common law pleading functioned according to a strict writ system. A plaintiff was obliged to obtain a writ from the court prior to filing a claim and in order for the particular court to assert jurisdiction, the specificity established in the claim had to fit within a specific from of action. In addition, writs were restricted exclusively to cases where precedents existed. If a writ was

the common law pleading because undue weight on the technicalities of the process reduced the likelihood that such cases would be resolved on their merits.[29] Generally, even before the ruling of the pleading stage, plaintiff's allegations were mandated to reduction of a single issue, separating questions of fact from questions of law. When complex and confusing cases arose, complaints could be readily dismissed without existing precedents.

In the early nineteenth century, dissatisfaction with traditional common law pleading induced the legal community to advocate for a new standard. The "code pleading" reconciled the American ideals of justice and democracy with the purpose of the pleading standard.[30] In 1848, the "Field Code" was developed[31] to merge equitable and legal actions within the American Courts. It only required "[a] statement of facts constituting the cause of action."[32] Dominating court practice until 1938, code pleading was a set of adopted rules that intended to promote clarity and uniformity in pleading requirements, thereby preventing unfair surprise to opponents and reducing costs of litigants.[33] The system was designed to require the pleading of operative facts, rather than legal conclusions, so that courts may effectively focus on the real issues of each case.[34] Nevertheless, similar to common law pleading, code pleading proved to be equally confusing because it became difficult to separate operative facts from legal facts and legal conclusions.

To curtail the reliance on the pleadings, the F.R.C.P. were intended to eliminate the burdens under code pleading and provide an accepting[35] approach that was

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acquired for the particular form of action, a plaintiff would then encounter procedures that were specific to the cause of action. *See*, CHARLES E. CLARK, CASES ON PLEADING & PROCEDURE 32 (1940) [hereinafter CLARK, 1940 CASEBOOK].

29. Jason G. Gottesman, Comment, *Speculating as to the Plausible: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 17 WIDENER L.J. 973, 976-78 (2008). *See* Julian, *supra* note 7, at 1184 (*citing* CLARK, 1940 CASEBOOK, *supra* note 28, AT 34 ("Clark thought written pleadings forced the common law into a 'prisonhouse' by eliminating the interaction between the litigants and the judge. . . . Two characteristics exemplify the rigid formality of special pleading under the English Common law: the writ system and issue pleading. The writ system required a plaintiff to bring his suit under a single correct form of action or have his case dismissed. Plaintiffs often found this unmanageable because some writs overlapped, such as trespass and trespass on the case. This overlap made it impossible at times to select the one correct writ for borderline cases.")).

30. *See* Schwartz & Appel, *supra* note 24, at 1111 ("[L]egal hurdles stood increasingly at odds with Americans' expanding personal liberties and notions of equal justice, thereby fermenting an environment conducive to a fundamental overhaul of the existing pleading system.").

31. *See* Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 448 (2009).

32. *Id.*; *See also* Julian, *supra* note 7, at 1186 (*citing* CLARK, 1940 CASEBOOK, *supra* note 28, at 137–38 ("Because a plaintiff had only to state the facts on which he based his claim, in theory code pleading al- lowed complaints so short and simple 'that even a child could write a letter to the court stating his case.'")).

33. Schwartz & Appel, *supra* note 24, at 1114.

34. *Id.*; *See* also Julian, *supra* note 7, at 1187 (arguing that the flaws of code pleading deviated from mandating that plaintiffs only state "'ultimate facts' unadulterated by legal conclusions or evidence . . . [a] requirement [that] was 'logically indefensible' because no bright line exists between different types of facts.").

35. Upon the construction of the 1938 Federal Rules, more than half of the states adopted the new rules and willingly implemented them into their own state structure. *See* Dodson, *supra* note 31, at 450; *see also* STEPHEN SUBRIN & MARGARET Y. K. WOO, LITIGATING IN AMERICA: CIVIL PROCEDURE IN CONTEXT 54 (2010) ("In total, there are 26 out of 50 states whose procedure is closely modeled on the Federal Rules.").

"simple, uniform, and transsubstantive[36]."[37] Rule 8 requires only "a short plain statement of claim showing that the pleader is entitled to relief."[38] The resulting language illustrates a departure from a fact-focused pleading to a notice-focused standard.[39] Moreover, Professor Dodson points out that the drafters did not include the word "fact" in the rule's language nor did they mention it in their notes.[40]

The Federal Rules were also to be applied to cases of law and equity, thereby merging the two systems. Historically, equitable cases required judicial subjectivity in determining fairness whereas cases of law were systematically more objective and subject to categorical rules. Merging the two systems did not successfully eliminate judicial discretion; in turn, the role of judicial subjectivity is an inherent, contributing factor of the Federal Rules. For example, Rule 8 was intended to be uniformly applied, however, notice varied, dependent on the claim and the circumstances of each particular case.[41] Judges were afforded discretion in determining the appropriate level of notice and consequently, Rule 8 fostered judiciary subjectivity even at the pleading stage. Nonetheless, the focus of the drafters remained on simplifying the pleading requirement and establishing a lower barrier so that both costs and expediency would be more effective.[42] In 1937, the Federal Rules of Civil Procedure were presented to Congress and became law as a result of congressional inaction.

Amending the Federal Rules

Pursuant to the Rules Enabling Act, the Federal Rules of Civil Procedure are

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36. Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DENV. U. L. REV. 377, 378 (2010) ("[T]ranssubstantive . . . [is] the notion that the same procedural rules should be available for all civil law suits: (1) regardless of the substantive law underlying the claims, or 'case-type' transsubstantivity; and (2) regardless of the size of the litigation or the stakes in- volved, or 'case-size' transsubstantivity.").

37. Fairman, *supra* note 9, at 556 (explaining that Charles E. Clark, a leading drafter of the Federal Rules, liberally advocated a de-emphasis on pleadings, placing more significance on discovery and summary judgment to distinguish the cases with merit from those without; and emphasizing that Fed. R. Civ. P. 8(e) must be construed so as to do justice). Clark also embraced the idea of simple pleading requirements primarily because the failure of code pleading stemmed from the approach's contradicting objectives: (a) "taking over the equity principles of convenience and flexibility" and (b) "laying down rigid rules that would leave nothing to discretion." Julian, *supra* note 7, at 1187.

38. FED. R. CIV. P. 8(a)(2).

39. Dodson, *supra* note 31, at 449.

40. *Id.*; 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FED. PRAC. & PROC. CIV. § 1202 (3d ed. 1990) (discussing that absent from Federal Rule 8(a)(2) is the constraint found in the code pleading where a pleader must establish *facts* to constitute a *cause of action*).

41. *See* Dodson, *supra* note 31 at 449; *see also, id.* ("The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case." (quoting Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460-61 (1943)).

42. Drafters believed that the efficiency of the simplified pleading would in part be attributed to the role of the discovery process; discovery rather than the pleadings would have the function to screen less meritorious cases, so that it would be more likely that such cases be resolved on their merits rather than technicalities. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 573 (2007); *see also* Schwartz and Appel, *supra* note 24, at 1118.

promulgated by the United States Supreme Court and subsequently approved by the United States Congress. The Court's modifications to the rules are usually based upon recommendations from the Judicial Conference of the United States, the federal judiciary's internal policy-making body.[43] In 1958, Congress divested the responsibility for the rule-making function from the Supreme Court and allocated it to the Judicial Conference of the United States.[44] Subsequently, the Judicial Conference created the Standing Committee on Rules of Practice and Procedure as well as Advisory Committees to propose and modify the rules.[45] Committees are made up of judges from the federal circuit and district courts, attorneys from the Department of Justice, and law professors from reputable institutions.[46] Advisory Committees are responsible for drafting the appropriate amendments accompanied with explicatory committee notes in light of the committee's agenda.[47] Although the advisory committees draft the amendments, outside actors are instrumental to the committees' end product.[48]

The inclusion of the amendment process suggests that there is a more appropriate alternative from changing the rules through judicial reinterpretation. It acts as a limitation on the courts and indicates that the judiciary ought not to abuse the power of procedural rulemaking via adjudication. The authority to freely reinterpret the rules as the Court sees fit will result in potential enlargement or abridgement of substantive rights; a consequence that was not part of the initiative of the Federal Rules.[49] The amendment process ensures that transparency and predictability will be maintained.

II. POLICY CONCERNS FROM *CONLEY* TO *TWIQBAL*

Almost two decades following the enactment of the Federal Rules of Civil

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43. Burbank, *supra* note 2 (discussing that the history of the 1934 Rules Enabling Act reflects a primary concern regarding the allocation of power to make law between the legislative and judicial branches).

44. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified as amended at 28 U.S.C. §§ 331 (2006).

45. Title IV of the Judicial Improvements and Access to Justice Act (1988), Pub. L. No. 100-702, 102 Stat. 4642, 28 U.S.C. §§ 2701(b)–(f), 2072–75 (2006), amended as *supra* note 40. Advisory committees exist for the following areas of law: civil, criminal, bankruptcy, appellate and admiralty.

46. *Id.* at § 2073(a)(2).

47. UNITED STATES COURTS, JUDICIAL CONFERENCE PROCEDURES, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/JudicialConfProcedures.aspx (last visited October 20, 2011).

48. Empirical data and panel discussions are common mechanisms that advisory committees have utilized in order to gauge support from the legal and academic communities. For example, at the Civil Rules Advisory Committee following the *Twombly* decision, a panel discussion was held in order to determine the appropriate time for the committee to respond and reevaluate the pleading standards in light of the Supreme Court decision. *See* Memorandum from the Honorable Mark R. Kravitz, Chair, Advisory Comm. on Federal Rules of Civil Procedure to the Honorable Lee H. Rosenthal, Chair, Standing Comm. On Rules of Practice and Procedure (Dec. 8, 2009) *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV12-2008.pdf.

49. Moore, *supra* note 12, at 1040 (discussing that "[t]he Court's interpretation of the Federal Rules does not involve the same separation of powers issues inherent in cases involving normal statutory construction, because the Court is interpreting rules Congress empowered it to create, not statutes created by a coequal branch").

Procedure, the Supreme Court recognized that a liberal pleading standard was essential to the emerging civil rights movement. In 1957, the U.S. Supreme Court decided *Conley v. Gibson*, a class action suit brought by African-American railroad employees against their union.[50] The employees alleged in the complaint that the union failed to protect them from demotion and discharge on the same basis as white employees. In a 9-0 decision, Justice Black wrote that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[51] Although the Court focused the decision on the appropriate role of pleading standards, the Court expanded the interpretation of Rule 8 in part to encourage that courts be used as an accessible forum to segregated America. To further maintain the balance between meritorious and meritless claims, the low threshold permitted African Americans and other minorities to use the judicial system to achieve justice.[52]

Within the context of civil rights, "the liberal pleading standard is a critical prerequisite to ensure that victims of discrimination can take full advantage of federal statutory safeguards."[53] The key successes of civil rights litigation in the last half century were attributed, in part, to the liberal pleading standard set forth in the Federal Rules and reinforced by *Conley*.[54] *Conley*'s notice pleading was not temporarily upheld but was consistently affirmed as the Supreme Court "rebuffed efforts by district and appellate courts to heighten pleading standards, and no Justice ever 'express[ed] *any* doubt' about the 'adequacy' of *Conley*'s interpretation of Rule 8."[55]

Legal scholars consider *Conley* to be an affirmation of the rationale employed by Rule 8; an objective to eliminate procedural hurdles at the initial stages of litigation that could ultimately be fatal to cases that do in fact have merit.[56] Although *Conley* may be warranted from a policy standpoint, it is not clear whether the Supreme Court had authority to broaden the scope of an existing written rule to indirectly accommodate racial tension. The Court's decision confirmed that "[i]t was important to give civil rights complainants . . . their day in court and let their cases be decided on the merits."[57]

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50. *Conley,* 355 U.S. at 41..

51. *Id.* at 45–6.

52. Schwartz and Appel, *supra* note 24, at 1120 (*citing* Geoffrey C. Hazard, Jr., *From Whom No Secrets Hid*, 76 TEX. L. REV. 1665, 1685 (1998)).

53. Civin & Adegbile, *supra* note 11, at 3. .

54. *Id.*

55. *Id.* (*quoting Bell Atlantic v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting)). The following Supreme Court cases rejected invoking a heightened pleading standard: *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

56. *Conley*, 355 U.S. at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

57. Suzette M. Malveaux, *Salvaging Civil Rights Claims: How Plausibility Discovery Can Help Restore Federal Court Access After* Twombly *and* Iqbal, THE AMERICAN CONSTITUTION SOCIETY FOR LAW AND PUBLIC POLICY 1 (Nov. 2010), http://www.acslaw.org/files/Malveaux%20issue%20brief%20-

Civil rights and employment discrimination claims continued to play an active role in the federal courts post-civil rights movement. From 1988 to 2003, the number of employment discrimination cases within the federal system increased in absolute numbers in proportion to civil litigation as a whole.[58] *Conley*'s standard made it fairly simple for plaintiffs to successfully plead discriminatory intent, especially for parties who did not have access to evidence.[59] The rise in civil rights and employment relief may be attributed to legislative developments.[60]

Undoubtedly, access to courts is a fundamental issue for private and public parties. It contributes to the judicial foundation of stare decisis, where precedents are established and encouraged to be followed within a transsubstantive framework.[61] Nevertheless, one must be granted not merely access but fair access to courts. The rise of cases[62] at the federal district level triggered political concern to alleviate the courts' caseload.

Since *Conley*, pretrial litigation has become the focal point of concern regarding judicial economy. The court is increasingly utilized as a "battleground for titans of industry to dispute complex claims involving enormous stakes . . . and the situs for aggregate litigation on behalf of large numbers of people and entities."[63] Complex claims involving technology, science, and business engaged in interstate and international commerce are more familiar today than fifty years ago, primarily because of the advent of technology. Complicated legal issues require more time and effort, which is burdensome for the parties and the courts,[64] and potentially advantageous for attorneys.[65] Rising litigation costs[66] play a key role in that they

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%20Fed%20Access%20after%20Twombly.pdf.

58. Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV 517, 524 (2010).

59. *See* Schwartz & Appel, *supra* note 24.

60. *See* Civin & Adegbile, *supra* note 11. *See also* Laura Beth Nielsen, Robert L. Nelson & Ryan Lancaster, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* 13 (Am. Bar Found. Research Paper Series No. 08-04, 2008), *available at* http://papers.ssrn.com/abstract=1093313 (suggesting that with the recognition of sexual harassment suits as a violation of Title VII in 1986, the Civil Rights Act of 1991 and the American Disabilities Act of 1992, legal action became a more appropriate and popular forum for social discrimination).

61. Miller, *supra* note 7, at 72.

62. Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 601 & n.5 (2010) ("The number of civil cases pending in district courts in 1965 was 74,395. WARREN ONLEY III, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1965, at 88 (1965). The comparable number in 1985 was 254,114. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 276 (1985).").

63. Miller, *supra* note 7, at 7-8.

64. *See id.* at 8-9 (arguing that the trend of complex legal issues helps to explain the importance of the pretrial process, where judicial case management and alternative dispute resolutions have become key efforts to avoid trial); Marc Galanter, *The Hundred-Years Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255 (2005) (finding that an abundance of data shows that the number of trials is declining).

65. Carrington, *supra* note 62, at 610 ("[B]usiness litigators' practice of billing for their services for the hour . . . billing heavily for their time.").

66. Although political concerns existed regarding the need to ensure judiciary efficiency and to minimize any potential overload, arguments for excessive use of discovery and associated costs are not proven to be a reality. *See* Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., National, Case-Basd Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules 12-13

are attributed to the need for expert testimony[67] and to provide access to evidence that is not ordinarily and readily available.[68]

Although the drafters of the Federal Rules of Civil Procedure emphasized that the rules be applied uniformly, that objective has not been consistently carried out. Inconsistency may be ascribed to the need to further effectuate the balance between judicial accessibility and efficiency in light of surrounding circumstances. For instance, since *Conley*, the legislature has enacted several acts that heighten the pleading requirements, e.g. Private Securities Litigation Reform Act ("PLRSA")[69] and the Y2K Act.[70] The aforementioned congressional acts illustrate that, although a transsubstantive framework exists or intends to exist, substantive rights must be altered to accommodate current concerns and realities through procedural rulemaking.[71]

Post-*Conley*, lower courts have attempted to impose heightened pleading in a variety of contexts, irrespective of the unambiguous language set forth in Rule 8.[72] Congressional enactments and lower court holdings illustrate the unwillingness to afford an unfettered right to court[73] and an effort to eliminate unmeritorious litigation.[74]

(2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf (finding that with the exception of a few cases, the cost of discovery and related pretrial proceedings is small when compared to the stakes in the cases, ranging from 1.6 % to 3.3 % of the amounts in dispute).

67. Carrington, *supra* note 62, at 610.

68. *Id.* at 610–11 (noting that the abusive, excessive use and costs of discovery were affiliated with commercial suits rather than civil rights claims).

69. Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995) [hereinafter PSLRA] (codified as amended in scattered sections of 15 U.S.C.). PSLRA is an effort by Congress, over a presidential veto, to curb abusive and frivolous private securities litigation by enacting a provision that requires plaintiffs to state with particularity facts that give rise to a strong inference that the defendant acted with the requisite state of mind. *See also* R. Tyler Hand, *The Private Securities Litigation Reform Act of 1995: Heightened Pleading Standards in Class Action Litigation*, 26 AM. J. TRIAL ADVOC. 685 (2003).

70. 15 U.S.C. §§6601–6617 (2001); Fairman, *supra* note 9, at 614-615 (explaining that heightened pleading was a result of congressional and senate hearings present in the bill's legislative history and an effort by Congress to limit meritless, frivolous litigation).

71. Carrington, *supra* note 27, at 610.

72. Scott Dodson, *Pondering Iqbal: Federal Pleading and Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 47 (2010); Fairman, *supra* note 9 at 551. *See also* Crawford-El v. Britton, 523 U.S. 574 (1998); Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit, 507 U.S. 163, (1993); Swierkiewicz v. Sorema N. A., 534 U.S. 506 (2002).

73. Mollie Brunworth, *Proposed Change to Civil Lawsuit Pleading Standard Strays Far From Original Federal Rule*, 25 WASHINGTON LEGAL FOUNDATION 1, 2-3 (2010), *available at* http://www.wlf.org/publishing/publication_detail.asp?id=2212.

74. Educadores Puertorriqueños en Acción, v. Hernandez, 367 F.3d 61 (1st Cir. 2004) (noting that trial judges have wide discretion in the management of the fact-finding process which is more useful and equitable to all parties and that heightened pleading standards, except those that emanate from either congressional or Rule-based authority, are impermissible).

III. TWIQBAL: A *CONLEY* REPEAT

Re-defining Rule 8

In 2007, the Supreme Court arguably contradicted *Conley's* ruling for the first time. *Twombly* promulgated a new, stricter "plausibility" standard, ruling that plaintiffs in an antitrust case may survive a motion to dismiss only if one pleads "enough facts to state a claim to relief that is plausible on its face."[75] Unlike *Conley*, *Twombly* did not involve racial tensions; it was a consumer class action brought against local telephone carriers for conspiring to inflate charges and to inhibit market entry of rival firms in violation of federal antitrust law. The plaintiff consumers contended that the defendants "engaged in parallel conduct" in their business activity to thwart the growth of competition. The plaintiffs premised their allegations on a "compelling common motivation" to inhibit competitive efforts of other regional telephone and Internet providers.[76] The complaint set forth that the local carriers "ma[de] unfair agreements . . . for access to . . . networks, overcharging, and billing in ways designed to sabotage [other local service providers'] relations with their own customers."[77] The Court did not find that the complaint evidenced any specific agreements among the defendant service providers, but that it merely set forth that such agreements could be inferred from the defendants' inactive efforts to pursue appealing business opportunities where it could be deduced that they did possess "substantial competitive advantages."[78]

Driving its decision, the Supreme Court believed that the public policy underlying traditional notice pleading no longer provided the appropriate balance necessary to promote justice and curb frivolous or highly speculative language.[79] It remained unclear whether *Twombly* applied exclusively to costly litigation, antitrust conspiracy suits or whether uniformly across the board.[80]

Two years later, in *Ashcroft v. Iqbal*, the Supreme Court clarified *Twombly* and held that the heightened pleading requirement[81] applied to all federal civil litigation claims, further deviating from the *Conley* framework.[82] Unlike *Twombly, Iqbal* declined to cite *Conley*, a well-established precedent that has been cited by courts 45,090 times.[83] *Iqbal* was a civil rights lawsuit brought by a Muslim male charged with identity theft in the wake of the terrorist attacks on September 11, 2001. He

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75. *Twombly*, 550 U.S. at 547.

76. *Id.* at 551.

77. *Id.* at 550.

78. *Id.* at 551.

79. *Id.* at 558-59.

80. *See* Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1083-85 (2009) (inferring that *Twombly* pertained only to high-discovery-cost cases).

81. *See* FED. R. CIV. P. 9(b).

82. Wendy Couture, *Conley v. Gibson's "No Set of Facts" Test: Neither Cancer Nor Cure,* 114 PENN ST. L. REV. PENN STATIM 19, 25 (2010), *available at* http://www.pennstatelawreview.org/articles/penn-statim/conley-v-gibson%E2%80%99s-%E2%80%9Cno-set-of-facts%E2%80%9D-test-neither-cancer-nor-cure/..

83. *Id.* at 30.

alleged that he was detained and identified as a person of special interest based solely on his race and national origin. On a 5-4 vote, the Supreme Court ruled that the plaintiff's allegations of discrimination were inadequate to survive a 12(b)(6) motion to dismiss.[84]

In re-evaluating *Twombly*, the *Iqbal* Court re-emphasized that Rule 8 does not require detailed factual allegations, however, conclusory and formulaic allegations will not suffice. In its reevaluation, the Court found that *Twombly* rested on two fundamental principles: (1) that a court must accept all plaintiff's allegations as true is inapplicable to legal conclusions; and (2) a complaint must state a plausible claim for relief to survive a motion to dismiss.[85] In its interpretation of Rule 8, the Supreme Court justified its holding in affirming that *Twombly* "expounded the pleading standard for all civil actions."[86]

Although some scholars[87] believe that *Twiqbal* did not unilaterally alter the pleading requirements, the Courts' holdings deviate from the decision written in *Conley*. As previously stated, there was a shift from the notice pleading to the plausibility pleading, however, it is unclear if that was the case in practice. Arguably, the Supreme Court merely confirmed in writing the "actual" pleading requirements as employed by the federal district courts.

As a means to case management, lower courts did heighten pleading requirements, yet, the overwhelming number of *Conley* affirmations[88] show that *Conley* was more supported than not. Subsequent congressional hearings, proposed legislation, and academic works further illustrate the unsettling effects of *Twiqbal* and the small probability that preserving status quo would minimize the political concerns.

While the holding in *Twiqbal* certainly deviates from the Supreme Court precedent written in *Conley,* there are both advantageous and disadvantageous justifications for the change. The critical issue is whether the Supreme Court was warranted to reinterpret Rule 8 through adjudication, a decision that would not only overturn a past precedent, but a decision that potentially affects substantive rights.

Distinguishing Conley *From* Twiqbal

The Rules Enabling Act of 1934 states that the judiciary has the capacity to construct and amend the Federal Rules of Civil Procedure, as shown by the passing of the rules in 1938. The Act does not explicitly permit the Supreme Court to

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84. *See* Petition for Writ of Certiorari at 3, Ashcroft v..Iqbal, 129 S. Ct. 1937 (2008) (No. 07-1015), 2008 WL 336225, *available at* http://www.justice.gov/osg/briefs/2007/2pet/7pet/2007-1015.pet.aa.html,*cert granted,* Ashcroft v. Iqbal, 554 U.S. 902 (2008).

85. *Twombly,* 550 U.S. at 555.

86. *Iqbal,* 129 S. Ct. at 1953 (internal citation omitted).

87. *See, e.g.*, CSX Transp., Inc. v. Meserole St. Recycling, Inc., 570 F. Supp. 2d 966, 969 (W.D. Mich. 2008) ("*Twombly* did not change did not change the notice-pleading standard; 'detailed factual allegations' are still not necessary, but the Supreme Court did hold that a plaintiff's complaint must contain 'more than labels and conclusions.'"); *see also* Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117 (2007).

88. Couture, *supra* note 82.

rewrite the rules or their interpretation through court decisions. Undoubtedly, the Supreme Court was granted the capacity of procedural rulemaking through the appropriate process. Amending the rules is also an available avenue within the Act's provision, potentially as a means to discourage ad hoc and unregulated adjudicative reinterpretation. With ways to amend the meaning and application of the rules, one must ask whether reinterpreting unambiguous language is a legitimate means to breathe life into Rule 8 as a way to effectuate case management.

Although *Twiqbal* is certainly a divergence from *Conley* in terms of interpretation, does it truly differ from the manner that *Conley* was decided? Is it possible that they both provide illustrations on how the Court used Rule 8 to respond and conform to existing political concerns? In the midst of segregation and the onset of the civil rights movement, *Conley* was an effort by the court to ensure that African Americans use the court as a forum for discriminatory claims. The legislative and executive branches made no explicit efforts to ensure that minorities would be afforded their day in court, however, the Court used the adjudication process to achieve immediate relief.[89] Similarly, *Twiqbal* was also a response to the political reality that courts may be overly burdened with meritless cases resulting in needless and expensive discovery. Since *Conley*, Congress has become increasingly comfortable in enacting legislation to heighten pleading requirements for specific areas of law to avert frivolous suits, e.g., the Y2K Act.[90]

Twiqbal also confers more discretion[91] to federal district judges. The *Iqbal* Court stated that determining whether a complaint states a plausible claim will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[92] The Court approvingly invites personal subjectivity when deciding the merits of the case at the pleading stage. Post-*Twiqbal,* there have been no direct judicial decisions that state that a claim that may be dismissed as implausible would (or might) have survived under the *Conley* "no set of facts" standard.[93]

To understand the significance of *Twiqbal,* one must question the role of judges and what their role ought to be in determining the adequacy of pleadings. *Twiqbal* implicitly advocates that judges act as the gatekeepers to the courts. Although they

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89. Paul Frymer, *Acting When Elected Officials Won't Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85*, 97 AM. POL. SCI. REV. 483, 484 (2003), *available at* http://www.jstor.org/stable/311762 ("In arguing that courts were chief activists in promoting civil rights during this period, at least in part because legislators frequently invited and even "commanded" them to intervene, my account is consistent with judicial scholars who emphasize the links between elected official behavior and court power.").

90. *See, e.g.*, Y2K Act, 15 U.S.C. §§ 6601-6617 (2006).

91. Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation,* 14 LEWIS & CLARK L. REV. 157, 159 (2010) ("*Iqbal* is about increased judicial discretion to inquire into and parse the details of complaints, almost certainly producing more 12(b)(6) dismissals, as well as wide variance from case to case, even within the same court.").

92. *Iqbal*, 129 S.Ct. at 1950 (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)).

93. Franklin E. White, Jr., *The* Bell Atlantic Corp. v. Twombly *Pleading standard: Has its Application been Outcome Determinative in Court to International Trade Cases*, 19 TUL. J. INT'L & COMP. L. (forthcoming 2011), *available at* http://www.cit.uscourts.gov/Judicial_Conference/pdf/2010/White%20Paper.pdf.

should play some part in this function, should a claim's merits be based exclusively on a judge's experience? Rather than informing the opposing party of the legal claims, *Twiqbal* shifts the sufficiency of adequacy to judicial discretion. Although not warranted, presiding judges invoke personal stances on key political issues and there are few constraints, if any, in applying the plausibility standard.[94]

Although federal judges are not traditionally permitted to decide which set of facts are more likely to be accurate at the pleading stage,[95] the *Iqbal* Court justified granting the 12(b)(6) motion to dismiss by weighing the "plausibility of different scenarios" in finding "that the government's explanations as to what occurred were *more likely* than Iqbal's allegations."[96] This standard gives more discretion to judges than summary judgments, where the judge must construe all the allegations as true and base his decision on the "reasonable juror," rather than invoking his own opinion. In weighing the evidence, judges are not only encouraged to evaluate the sufficiency and accuracy of the facts alleged, but they must also consider whether the claims and stakes in question warrant a proportional cost of discovery.[97]

Although meritless litigation is certainly a concern, unlike the circumstances of *Conley*, immediacy of reinterpreting Rule 8 is not equally justifiable. *Conley* helped to ensure that minorities were afforded civil rights whereas *Twiqbal* aims to further judicial economy. Moreover, the former directly targeted constitutionally protected rights whereas the latter was a means to further case management. Although *Conley* may have been an opportune time to further minimize the barriers that pleading requirements establish, *Twiqbal* does not necessitate the expansion of judicial safeguarding especially when other avenues are available. Commentators propose that *Conley* is further warranted because it remains in the spirit of the drafters of the Federal Rules of Civil procedure, whose objective was to minimize the procedural hurdles for litigants.[98]

Historically, the Rules Enabling Act reasoned that the Court could be an appropriate key player in employing procedural rules because it was less likely that

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94. Roger M. Michalski, Assessing Iqbal, Harvard Law and Policy Review Online (Dec. 8, 2010), *available at* http://hlpronline.com/2010/12/assessing-iqbal/.

95. *Twombly*, 550 U.S. at 583 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*")).

96. Michalski, *supra* note 94 (emphasis added) (citing *Iqbal*, 129 S.Ct at 1951).

97. Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 896 (2009) ("[P]roportionality rules ask the impossible: judges must decide when discovery cost is proportional to somemeasureof 'value' that includes both evidence value . . . and case value. . . . .This yields a fundamental information-timing problem: discovery disputes occur before parties marshal all the evidence, so how can courts measure the value of particular evidence, much less case merits?").

98. Richard A. Epstein, Bell Atlantic v. Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U.J.L. & POL'Y 61, 64 (2007) ("Conley has long been treated as an authoritative statement of the law that has been followed uniformly in the Supreme Court and elsewhere and the plaintiffs' allegations are quite in the spirit of the Federal Rules. The Conley complaint is fact-free but gives notice of the basic elements of the claim. Twombly can not be defended if the only question is whether it captures the sense of notice pleading in earlier cases.").

the Court could be swayed by public opinion in determining what is best for litigants and the court. The Court did not receive this authority to expand its power, nor is it constitutionally[99] consistent.[100] By inviting judiciary subjectivity, the fairness of the federal justice system is compromised by permitting judges to ultimately decide a suit's success at the pleading stage.

In comparing *Conley* against *Twiqbal* and questioning the immediacy of relief in each case, the shift to the plausibility pleading standard suggests an increase of authority to the judiciary, an increase that is not warranted, directly or indirectly.

IV. THE TWIQBAL FIX

Responding or Repairing?

Replacing the notice pleading, a standard in effect for nearly five decades, begs the question: Why? Commentators have criticized and praised the *Twiqbal* plausibility pleading with endless lists of both the advantages and disadvantages of the decision as well as its effects. Nevertheless, because of its speculative nature, few reviews exist to the rationale driving the court in its recent decisions.

As previously held, the notice and plausibility pleadings were effectuated in the same manner through the adjudication process. Rather than relying solely on the text of Rule 8, the Supreme Court used judicial interpretation to further articulate the meaning and application of the rule. As *Conley* aimed to further liberalize the requirements, *Twiqbal* restricted the liberal pleadings by enforcing plausibility rather than possibility. *Twiqbal* has been theorized as merely an effort to undo *Conley*; if *Conley* did not correctly interpret the application of Rule 8, how can the Supreme Court be sure that *Twiqbal* is correct. If the judiciary did not interpret it correctly the first time around, will it be able to interpret it correctly the second time around?

On another note, *Twiqbal* was not merely a means to repair *Conley* but, arguably a response to current political concerns. It is not necessarily the case that *Conley* was misinterpreted but that the Supreme Court realized that the notice pleading was no longer effective. In establishing procedural rules, the judiciary is accredited with knowing best;[101] however, knowing best does not authorize the judiciary to unilaterally tweak the rules by circumventing the amendment process.

Although judicial misinterpretation and policy concerns both warrant a response, it is not clear that they both evenly warrant legitimate, judicial relief. It is contended that the former rather than the latter merits judicial relief, but it becomes problematic when the notion of misinterpretation is driven by existing concerns.

Furthermore, it may be more advantageous to distinguish between *Twombly* and *Iqbal* to further understand the objective that *Twiqbal*, as a whole, aims to achieve. *Twombly*, is an antitrust case concerning conspiracy allegations through

99. U.S. CONST. art. III.

100. *See* Burbank, *supra* note 4, at 1688.

101. *See id.* at 1731.

parallel conduct, a violation of the Sherman Act. Given the inherent, speculative nature of conspiracies, plaintiffs often lack accessibility to internal documentation that substantiate an antitrust claim.[102] Thus, discovery becomes key. The heightened standard assures that discovery cannot be used as an abusive tool. Moreover, the requirement of factual specificity applies to a broad range of conspiracy claims.[103]

Iqbal highlights the same point in civil rights. Overruling the lower courts, the Supreme Court in a 5-4 decision expanded *Twombly* and dismissed the allegations without permitting Iqbal to acquire discovery and without ruling on the merits of his claim. Accordingly, government is potentially afforded greater leeway in carrying out courses of action that appear discriminatory.

Iqbal did not evaluate nor distinguish the effects that a heightened pleading standard may have on a civil rights claim versus anti-trust claims. *Twombly* and *Iqbal* present a commonality in that "*Iqbal* did not have an opportunity to observe the defendants' state of mind, just as the plaintiffs in *Twombly* did not have an opportunity to observe the state of mind and secret conduct of the alleged antitrust violators."[104] In applying *Twombly, Iqbal* illustrates that distinctions ought not to be considered in order to effectuate the framers' transsubstantive approach, despite the drafters' efforts in recognizing exceptions[105] to Rule 8. Although pushing for a transsubstantive approach is consistent with the drafters' efforts, substantive rights differ dependent on the claim presented and the parties at stake.[106]

It may appear to be a *procedural* rule, though substituting the notice pleading with a higher standard inevitably alters litigants' substantive rights.[107] A complaint carries significant weight because judges use it at the outset to causally determine the success of each case before further continuing with the court process. Substantive rights are affected because the higher pleading requirement places a heavier burden on the plaintiff to establish accurate and sufficient allegations to survive a motion to dismiss. Undoubtedly, the Court has the capacity to construct, define, and re-define the Federal Rules, however, they ought not to design or interpret the rules in such a way as to alter an individual's substantive rights.[108]

The Legislative Fix

It is undisputed that *Twiqbal*'s plausibility pleading has replaced *Conley*'s holding, however, is *Twiqbal* actually achieving the objectives that the Court set forth? The *Twombly* Court explained that the plausibility pleading was a key

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102. *See* Michalski, *supra* note 94.

103. *Id.*

104. *Id.*

105. *See* FED. R. CIV. P. 9(b).

106. *See* FED. R. CIV. P. 12(b)(6) (motion to dismiss); FED. R. CIV. P. 9(b) (heightened pleading standard); FED. R. CIV. P. 56 (summary judgment).

107. Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

108. *See* Carrington, *supra* note 27, at 661.

response to abusive litigation costs.[109] However, Professor Scott Dodson theorizes that the recent standard actually increases costs and prolongs efforts.[110] The unnecessary costs may be reduced at the discovery stage. Increasing costs exist at the pleading stage by shifting costs to an earlier pre-trial stage. By placing more emphasis on the accuracy and sufficiency of the complaint, *Twiqbal* actually compels plaintiffs to expend more time and resources in making sure that the complaint meets the heightened standard. In turn, defendants expend more time and resources on answering the complaint, providing affirmative defenses and filing motions to dismiss, pursuant to 12(b)(6) rather than focusing on the merits of the case.[111]

The burden of unwarranted merits discovery may have lessened, however, its diminishment is at the cost of dismissing cases that are possibly meritorious. Studies show that the heightening pleading standard inevitably dismissed more cases in comparison to the prior notice pleading.[112] Nonetheless, the heightened standard does not distinguish meritorious suits from malicious suits; thus, meritorious claims will nonetheless be dismissed.

Judges have a duty to interpret and govern the procedural rules in a "*just*, speedy, and inexpensive" manner;[113] *Twiqbal* fails to equally consider the fairness prong. The Supreme Court holdings prioritize the speculative effectiveness of timing and defendant costs over what are in fact reasonable and just, inherent and necessary characteristics of the judicial process.[114] Perhaps, the legislature should be responsible for limiting *Twiqbal* to ensure that justice remains a crucial aspect of the judicial and court processes.[115]

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109. *Twombly*, 550 U.S. at 559 ("[It is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim." (quoting Dura Pharms Inc v. Broudo, 544 U.S. 336, 347 (2005)).

110. Twombly, Iqbal *and Federal Pleadings Standards: Sea Change or Same Old, Same Old?*, Webinar presented By the IADC Appellate Practice, Business Litigation, Corporate Counsel, and Class Action and Multi-Party Litigation Committees (Nov. 11, 2010), *available at* http://www.iadclaw.org/UserFiles/file/Twiqbal%2011_11_10%20final%20presentation.pdf

111. *Id.*; *see* Miller, *supra* note 7, at 69 ("The savings achieved by early termination may not offset the increased costs likely to be incurred as a result of more extensive preinstitution activities and fact-based pleading, the increased number of dismissal and summary judgment motions, and, potentially, the increased number of appeals from judgments following early terminations.").

112. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010). Professor Hatamyar selected 1200 cases at random: 500 cases were chosen two years prior to *Twombly*, 500 from the two years following *Twombly*, and 200 from the four month period following Iqbal. Her findings show that the 12(b)(6) dismissal rate did not change significantly for the initial pre- and post-*Twombly* periods, but there is a marked difference in the data following *Iqbal* where the dismissal rate increased.

113. FED. R. CIV. P. 1.

114. Stephen N. Surbin, *How Equity Conquered Common Law*, 135 U. PA. L. REV. 909, 933-74 (1987) (discussing the documentation of the history and motivation regarding the adoption of the federal rules; in merging the systems of law and equity and determining what is reasonable and fair remained an important aspect of the court forum, the significance of employing figures that were not politically accountable further demonstrates the necessity to uphold justice within.); *see also* Fed. Equity Rule 25 (requiring "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence"), *reprinted in Twombly*, 550 U.S. at 574.

115. *See* JOHN G. ROBERTS, JR., DRAFT ARTICLE ON JUDICIAL RESTRAINT (1981) ("[J]udicial

Although legislative bills have been introduced to the respective houses, they fail to adequately respond to the issues that *Twiqbal* presents and the policy concerns that prompted the heightened pleading standard; perhaps, a reason why they never became law.

Senator Arlen Specter proposed the Notice Pleading Restoration Act of 2009 to the Senate in July 22, 2009 and introduced it twice to the Committee on the Judiciary, however, there was no subsequent action. The bill provides that:

> [E]xcept as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).[116]

The proposed legislation aims to ensure that federal courts follow the traditional approach to the Federal Rules of Civil Procedure. As previously stated, it is unclear whether *Conley*'s interpretation of Rule 8 is synonymous with the drafters' interpretation. *Conley* was decided in the same manner as *Twiqbal*, as a judicial response to existing political concern. Rather than relying on the literal text of Rule 8, the Court unilaterally invoked its own interpretation of an established rule. Restoring *Conley* would not only disregard the inefficiencies affecting modern judicial economy, but it would also bring about confusion between the judicial and legislative roles. Although *Twiqbal* begets a "blank check for federal judges to get rid of cases they disfavor,"[117] overruling court precedent with legislation would be synonymous with fighting fire with fire[118] by encouraging branches to work against one another rather than with one another.

Similarly, Representative Jerrold Nadler proposed the Open Access to Courts Act of 2009 to the House of Representatives, providing that: A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief.[119] This bill has not yet become law and it is unlikely that it will rouse sufficient support to do so in the future, even though it had thirty-six co-sponsors supporting the bill, more than the two co-sponsors supporting the correlating senate bill.

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policymaking is [an] inevitably inadequate or imperfect policymaking. The fact-finding resources of courts are limited – and inordinately dependent upon the facts presented to the courts by the interested parties before them. Legislatures, on the other hand, have extensive fact-finding capabilities that can reach far beyond the narrow special interests urged by parties in a lawsuit.").

116. Notice Pleading Restoration Act of 2009 S. 1504, Cong. 111 § 2 (2009).

117. Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 20, 2009, *available at* http://www.nytimes.com/2009/07/21/us/21bar.html?_r=3&hpw.

118. Edward A. Hartnett, *Responding to* Twombly *and* Iqbal: *Where Do We Go From Here?*, 95 IOWA L. REV. BULL. 24, 29 (2010), *available at* http://ssrn.com/abstract=1567694 ("An attempt to overrule a judicial decision that adopts a different view of what the question is runs the risk of the Court and Congress speaking past each other, with the result that the statute misfires.").

119. H.R. 4115, 111th Cong. § 2 (2009).

Although bills that do not become law may be reintroduced, it is unlikely that these proposed legislative acts are going to attract sufficient support from the respective houses. The bills do nothing but overturn the newly established plausibility pleading, a rational standard that acts as a mechanism to prevent abusive and frivolous litigation. I also deem that the new pleading requirements are not flawless. In order to achieve a pleading standard that is reliable and not easily susceptible to judicial transformation, the legislature should elaborate on the Court's interpretation.[120] Congressional action not only requires further empirical studies and research, but action that further defines and limits the *Twiqbal* pleading requirements.

Contrastingly, some political scholars and commentators support *Twombly* and *Iqbal* by advocating that the decisions "faithfully interpret and apply the pleading requirements of the Federal Rules of Civil Procedure, [which] are consistent with the vast bulk of prior precedent, and strike an appropriate balance between the legitimate interests of plaintiffs and defendants."[121] After evaluating legislative efforts as well as other proposals, Professor Hartnett proposes an amendment to Rule 12 that helps protect plaintiffs from having their claims dismissed when the requisite evidence is in the hands of the defendant.[122]

Essentially, Professor Hartnett proposes a rule that allows courts to determine whether to grant a motion under Rule 12(b)(6) based on the parties' argument over whether sufficient evidence exists to support a claim or, in the absence of that, whether discovery is likely to produce evidence sufficient to support a claim.[123] Under this proposal, one that does not advocate for the reinstatement of *Conley*, if the court refuses to permit discovery, the allegation is not necessarily dismissed.[124]

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120. Hartnett, *supra* note 118, at 25-26 (pointing out that restoring *Conley*'s "no set of facts" language would still require the Court to supply some interpretation, an interpretation that may nonetheless restore *Twiqbal*, regardless of legislative efforts).

121. *Access to Justice Denied:* Ashcroft v. Iqbal*: Access to Justice Denied, Hearing before the H. Subcomm. on the Constitution, Civil Rights and Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *House Hearing*], *available at* http://judiciary.house.gov/hearings/hear_091027_1.html.

122. Hartnett, *supra* note 118, at 33.

123. *Id.* Professor Hartnett suggests the following:

> Rule 12(j): Allegations Likely To Have Evidentiary Support After a Reasonable Opportunity for Discovery
>
> If, on a motion under Rule 12(b)(6) or 12(c) that has not been deferred until trial, the claim sought to be dismissed includes an allegation specifically identified as provided in Rule 11(b)(3) as likely to have evidentiary support after a reasonable opportunity for discovery, the court must either (1) assume the truth of the allegation, or (2) decide whether the allegation is likely to have evidentiary support after a reasonable opportunity for discovery. In deciding whether an allegation is likely to have evidentiary support after a reasonable opportunity for discovery, the court must consider the parties' access to evidence in the absence of discovery and state on the record the reason for its decision.
>
> If the court decides that the allegation is likely to have evidentiary support after a reasonable opportunity for discovery, it must allow for that discovery, under the standards of Rule 26, and deny the motion to dismiss. If the court decides that the allegation is not likely to have evidentiary support after a reasonable opportunity for discovery, the court must treat the motion as one for summary judgment under Rule 56, and provide all parties a reasonable opportunity to present all the material that is pertinent to the motion.

124. *Id.*

Plaintiffs are, however, afforded the opportunity to present the evidence in their possession to persuade the court that a triable issue does, in fact, exist. Moreover, Professor Hartnett also minimizes the emphasis that Rule 8 plays post-*Twiqbal* and attempts to restore the emphasis and function of other judicial safeguards, e.g., summary judgment.[125]

In brief, I agree with Professor Hartnett that the reinstatement of *Conley* will not restore the legitimacy of the pleading requirements nor will it appease existing political concern.[126] However, I do not believe that providing judges with the discretion to decide whether an allegation is likely to have evidentiary support after a reasonable opportunity for discovery will effectuate the inefficiencies that *Twiqbal* creates. Professor Hartnett's proposal calls for judges and plaintiffs to participate in a guessing game. Plaintiffs will speculate as to what and where they are looking and courts will conjecture as to whether or not there is an opportunity for evidentiary access,[127] something that cannot be sufficiently achieved in judicial capacity.[128] Rather than limiting judicial subjectivity, which is increased because of *Twiqbal*, the appropriate response would be to limit or guide judicial subjectivity rather than further develop it.

Perhaps the more responsive approach would be for Congress to further define and limit *Twiqbal* so that both the legislative and judicial branches may support a pleading standard. A clarification of the new pleading requirements would also ensure that federal courts understand and apply the plausibility standard in a correct manner and not exploit it through unfettered judicial subjectivity. Limiting *Twiqbal* would also prevent the court from using a federal rule to enlarge judicial power or to freely respond to political concerns.[129]

In order for this to be accomplished, the legislature must continue to hold congressional hearings and gather empirical data so that it can fully understand the

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125. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 18 (2010) ("The motion to dismiss is the new summary judgment motion.").

126. *See "Has the Supreme Court Limited Americans' Access to Court?": Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 22 (2009) (Prepared Statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) (arguing for an emergency-stopgap measure to temporarily reset the law to its state prior to *Twombly*, rather than seeking a permanent restoration of *Conley*).

127. Liptak, *supra* note 117. Similarly to *Iqbal*, where the court held that judges ought to use their own judicial experience and common sense, it will be nearly impossible to provide a systematic approach that guides judges in determining the potentiality for discovery; likewise such ad hoc approaches only "license[] highly subjective [and potentially flawed] judgments."

128. Hartnett, *supra* note 118, at 36. Though I do entirely support Professor Hartnett's objective of transparency, where courts are encouraged to state on the record the reason for their decisions, statements ought to be collected by the Federal Judicial Center and evaluated for recurring patterns, thus providing a basis for rulemaking or legislation that codified a dominant approach to a recurring pattern, or adopted one of the competing approaches to a recurring pattern. It could also provide a basis for rejecting the way courts handle a recurring pattern.

129. Osborn v. Bank of the United States, 22 U.S. 738, 866 (1824) ("Courts are the mere instruments of the law, and can will nothing."); Edward McWhinney, *The Supreme Court and the Dilemma of Judicial Policy-Making*, 39 MINN. L. REV. 837, 843 (1955) (explaining that judicial self-restraint is predicated on reason and confidence that the legislature, a politically accountable body, has the capacity and authority to enact policy decisions; therefore the judiciary must defer legislative decisions, irrespective of its own beliefs for "judicial review is not always a very efficient form of policy-making.").

consequences of the modified pleading. Although it would be ideal for the legislature to respond in a prompt manner, so that it may continue to act as a check and to shield judicial overreaches, such as the one in question, a rash and thoughtless response would only undermine the role and legitimacy of the legislature as a politically accountable branch.

Although a quick fix would be ideal to the resulting tension that *Twiqbal* creates within the judicial process, it would be more beneficial to restore and define the Supreme Court's role and limitations pursuant to the Rules Enabling Act. Exclusively resolving the effects of *Twiqbal* may alleviate existing controversies, however, it will fail to preclude the judiciary from reinterpreting the procedural rules in the future to modify established precedent, alter substantive rights, or expand judicial authority.

Overturning *Twiqbal* is a short-term solution that neglects to focus on the core issue at stake: should the judiciary be able to reinterpret the Federal Rules through adjudication, although they have the capacity to construct and amend the rules through a prescribed process? Accordingly, I propose the following amendment to the modern-day Rules Enabling Act codified as 28 U.S.C. § 2072:

> (d) Such rules, as referred to in (a) ["rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals"], prescribed by the Supreme Court shall not be modified through the adjudication process. A change in the legal standard of the rules as proposed by the Supreme Court must be addressed through a revision of the written rule.

This proposal ensures that the judiciary does not misappropriate the federal rules of practice and procedure and that any modifications of the rule are employed in a transparent and systematic manner. The Court is not forbidden from amending the rules. Any changes must undergo the process of actually amending the rule, rather than circumventing it.[130] Moreover, the provision acts as a limitation as well as a check in ensuring that the Supreme Court promulgates rules of procedure rather than policy.[131]

If the court were able to amend the rules through the adjudication process, the significance of the 1988 amendments, revising the implementation section of the Rules Enabling Act to open public access, would evade.[132] Transparency is key.[133]

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130. Transparency is further illustrated by the 1988 amendments to the Rules Enabling Act, furthering the role of public participation. *See* Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 735 (1995) ("With the amendment of the Rules Enabling Act in 1988 and the public opening of judicial advisory committee meetings, the practical business of the judicial rulemaking bodies has changed significantly . . . a scholarly, deliberative enterprise now has many of the hallmarks of a congressional committee legislative mark-up.").

131. *See* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1330 (1993) ("Congress, under the Rules Enabling Act, possesses a supervisory role of reviewing court-promulgated rules prior to their becoming law to ensure that such rules do not trench on Congress's substantive law-making function. This allocation of authority is reinforced by the judicial review process, which also ensures that the rulemaking allocation is not transgressed when the courts exercise their rulemaking power.").

132. *See id.; see also* 28 U.S.C. § 2073 (1988). Section 2073(c)(1) provides for public meetings and

Congress granted the Court the authority of procedural rulemaking; it did not bestow the capacity to use judicial interpretation to rewrite law in its understanding or application. *Twiqbal* goes too far and masks the transparency that the amendments intend.

Perhaps an analogy to the Congressional approach of legislation will further illustrate this point. When Congress enacts law it is set forth in written text. In the process of passing legislation, both houses hold hearings to qualify the application and understanding of the potential law. After the enactment of the law, Congress has the opportunity to change the law; any modification or development is predominantly accomplished by a repeal or an amendment. Congress is not permitted to "reinterpret" the law as they see fit, for that is the role of the Court. Similarly, the Court should not be permitted to freely "reinterpret" the rules, at least through the adjudication process.

One may then ask who is responsible for interpreting the Court's promulgated rules, though it is unclear whether that role is even required. Federal rules of practice and procedure are intended to be clear-cut and unambiguous, for such rules are directed to alleviate the burdens within the judicial economy from an efficiency standpoint. Preventing the Supreme Court from modifying the rules through interpretation will persuade the judiciary, similarly to the legislature, to construct intelligible and understandable rules, for if rules are ambiguous and subject to more than one interpretation, efficiency will be difficult to effectuate.

CONCLUSION

Although scholars and political activists have engaged in endlessly listing the advantages and disadvantages of *Twiqbal*'s heightened pleading requirements, identifying the pros and cons does not respond to the point in issue. The holdings of *Twombly* and *Iqbal* were construed similarly to *Conley*: using judicial interpretation to change existing written, procedural precedent.

The main issue is not that *Twiqbal* deviates from *Conley*'s "no set of facts" language, but that the court has used the adjudication process to circumvent the amendment process. The Rules Enabling Act had a clear cut objective: to create a more efficient approach to court processes, perhaps those who are most familiar should be granted the opportunity to establish procedural rules. Efficiency was of utmost importance, however, efficiency does not warrant the court to take short cuts. I concur with Justice Stevens that *Twiqbal* is a "poor vehicle for the Court's new pleading rule.[134] Unless amended, rules are to be followed as they were

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minutes of proceedings. Section 2073(d)(1) requires explanatory commentary for proposed rule revisions. An attempt to require that the advisory rules committees consist of a "balanced cross section of bench and bar" was deleted from the final 1988 revisions to the Rules Enabling Act.

133. *See* Burbank, *supra* note 2, at 1724 (2004) (arguing that "the changes in the rulemaking process in the 1980s that were designed to open it up to more and more diverse points of view, make it more transparent, and diminish the need for congressional involvement, may in fact have facilitated a process of redundancy wherein participants treat rulemaking that is at all controversial as merely the first act").

134. *Twombly*, 550 U.S. at 586–87; *see* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938) ("[R]ules of procedure tend to assume a too obtrusive place in the attentions of judges and

established, not when it is convenient to do so.

lawyers—unless, indeed, they are continually restricted to their proper and subordinate role.").